United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4172

To be argued by
THOMAS H. BELOTE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4172

ROY HIBBERT,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE
BOARD OF IMMIGRATION APPEALS

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P/S

RESPONDENT'S BRIEF

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Statement of the Issue

Whether the order of the Board of Immigration Appeals denying the petitioner's motion for reconsideration of its prior decision in which it declined to reopen the petitioner's deportation proceedings was an abuse of discretion.

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1105a(a), Roy Hibbert petitions this Court for review of an order rendered by the Board of Immigration Appeals (the "Board") on June 3, 1976. That order denied Hibbert's motion for reconsideration of a prior board decision dated May 30, 1975 in which the Board denied a motion by Hibbert to reopen his deportation proceedings in order to apply for the dis-

cretionary privilege of voluntary departure in lieu of deportation under Section 244(e) of the Act, 8 U.S.C. § 1254(e).

The petitioner contends that the Boards' order should be set aside because "it constituted a failure or refusal to exercise its discretion and resulted in an error of law" (Petitioner's Brief, Statement of the Issue Presented for Review, p. 1). This petition, seeking review of the Board's order, was filed on July 16, 1976. Since the date of filing this petition, the alien has enjoyed the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106 of the Act, 8 U.S.C. § 1105a.

Statement of the Facts

The petitioner is a 38 year old alien and a native and citizen of Jamaica and who knowingly entered the United States at the Canadian border on or about November 15, 1970 by paying an unknown individual to drive him across the border and into New York. (A.R. p. 47-48, 95, 120-131). At the time of his entry to this country he was not inspected by a United States Immigration official nor was he in possession of a valid immigrant visa. Therefore his entry was in violation of the penal provisions of the Act. Section 8 U.S.C. § 1325. Shortly after his entry, on May 4, 1971, Hibbert entered into an allegedly fraudulent marriage with a citizen of the United States, Mattie E. Martin, in order to obtain benefits under the immigration laws of this country. On June 25, 1971 a visa petition was filed on Hibbert's behalf in order to accord him the status of an immediate relative under Section 201(b) of the Act, 8 U.S.C. 1151. The approval of such a petition would allow him to obtain an immigrant visa, if Hibbert demonstrated that he was other-

wise qualified, and be admitted to the United States without regard to the numerical limitations in the Act (A.R. pp. 115, 118).* On August 4, 1971 both the alien and Mattie E. Martin were called in to the Immigration and Naturalization Service (the "Service") district office in Buffalo, New York where they gave sworn statements attesting to the bona fides of their marital relationship and supporting the visa petition submitted in Hibbert's behalf (A.R. 132-140). On September 1, 1971 the Service District Director in Buffalo approved Hibbert's visa petition. Hibbert was granted until October 8, 1971 to depart voluntarily.

On June 19, 1973 Mattie E. Martin withdrew the visa petition she had submitted on Hibbert's behalf stating that she has never lived with Hibbert in a husband and wife relationship and that it was her intent to have that marriage annulled (A.R. p. 142). Also, on June 19, 1973 she gave a sworn statement to Service investigators describing how the marriage between Hibbert and herself had been arranged; the money she had received for entering into the marriage; her reasons for entering into the marriage; the circumstances surrounding the filing of the visa petition; and the complete absence of a bona fide husband-wife relationship which would have been a prerequisite to Hibbert's admission to the United States as an "immediate relative" as defined in the Act (A.R. 97-113, See also A.R. p. 143). Accordingly, on October 26, 1973 the Service's District Director revoked the visa petition pursuant to the provisions of 8 C.F.R. § 205.1(a).**

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* References preceded by the letters "AR" are to the Certified Administrative Record previously filed with this Court.

** 8 C.F.R. § 205.1(a) provides in pertinent part:

§ 205.1 Automatic revocation.

The approval of a petition made under Section 204 of the Act and in accordance with Part 204 of this chapter is revoked as of the date of approval if any of the fol-

[Footnote continued on following page]

On October 26, 1976 the Service commenced deportation proceedings against Hibbert with the issuance of an order to show cause and notice of hearing charging that he was deportable under Section 241(a)(1) of the Act, 8 U.S.C. § 1251(a)(1) (A.R. p. 95). See also Section 212(a)(20) of the Act, 8 U.S.C. § 1182(a)(20). The deportation hearing was conducted on December 18, 1973 and January 8, 1974 before Immigration Judge Aaron I. Maltin (A.R. pp. 46-94). Hibbert's alienage and deportability were not contested but the alien sought the discretionary privilege of voluntary dpearture in lieu of enforced deportation (A.R. p. 48).

On March 19, 1974 Judge Maltin rendered his decision finding Hibbert deportable as charged and ordering him deported from the United States. (A.R. pp. 41-44). In his decision the Immigration Judge found that Hibbert lied during his sworn statement of August 4, 1971 and that these falsehoods were made to deliberately color the application favorably such that it would be granted. Accordingly, Judge Maltin found that these statements constituted false testimony under Section 101(f) of the Act, 8 U.S.C. § 1101(f) and that Hibbert was therefore statutorily ineligible for voluntary departure under Section 244(e) of the Act, 8 U.S.C. § 1254(e). The Immigration Judge also found that even if Hibbert's statements did not constitute false testimony, voluntary departure should be denied under the circumstances as a matter of discretion. (A.R. pp. 43-

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lowing circumstances occur before the beneficiary's journey to the United States commences or, if the beneficiary is an applicant for adjustment of status to that of a permanent resident, before the decision on his application becomes final:

(a) Relative petitions. (1) Upon formal notice of withdrawal filed by the petitioner with the officer who approved the petition.

44). On April 2, 1974 Hibbert appealed the denial of voluntary departure to the Board of Immigration Appeals (A.R. p. 39). On November 21, 1974 the Board affirmed the decision of the Immigration Judge, that Hibbert's application for voluntary departure did not warrant the favorable exercise of discretion and dismissed the appeal (A.R. pp. 24-25).

On February 27, 1975 Hibbert with new counsel filed a petition to review the Board's decision of November 21, 1974 and thereby obtained an automatic statutory stay of deportation under Section 106 of the Act. Inasmuch as the mere filing of an administrative motion to reopen would not stay Hibbert's deportation under 8 C.F.R. § 3.8(a) or 8 C.F.R. § 242.22 the utilization of the automatic stay provision in Section 106 of the Act provided the alien with an effective method of preventing his removal. Having obtained the necessary stay Hibbert's new attorneys entered an appearance in the Service proceedings and, on March 10, 1975, moved to reopen the alien's deportation proceedings. (A.R. pp. 23, 19-20). In his moving papers Hibbert alleged that on December 14, 1974 (only twenty-five days after the Board had denied his appeal and ordered him deported) he married a lawful permanent resident alien who had filed an application for naturalization. Hibbert also alleged that his new wife was pregnant and due to give birth in August, 1975. Hibbert therefore contended that he should be granted voluntary departure because he *now* had those close family ties in the United States and because his deportation would be a hardship causing family disruption.*

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* The alien's motion to reopen the deportation proceedings in and of itself indicates that Hibbert was no longer satisfied with utilizing fraud and deceit to frustrate his deportation. Hereafter the proceedings reflect a purposeful utilization of dila-

[Footnote continued on following page]

On May 30, 1975 the Board rendered a decision on Hibbert's motion to reopen. Citing each of the Service's arguments in opposition to the motion (i.e. (1) that the motion did not comply with 8 C.F.R. § 3.8; (2) that the new marriage, occurring immediately after the dismissal of his appeal, was not a factor which, by itself, merited the granting of voluntary departure; (3) that Hibbert's prior marital history created sufficient suspicion about his second marriage; (4) that Hibbert was ineligible for the privilege of voluntary departure under Section 101(f) of the Act the Board concluded:

> We have carefully reviewed the record in this matter and have decided to deny the motion to reopen the proceedings to permit the respondent to apply for voluntary departure in the exercise of administrative discretion. . . . (A.R. p. 15).

Hibbert was nonetheless still able to block his deportation inasmuch as he continued to enjoy the automatic statu-

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tory tactics to block his removal. Quite clearly Hibbert's motion of March 10, 1975 to reopen was completely lacking in merit. On January 3, 1975 this Court had already upheld the Service's policy of denying extended voluntary departure to illegal permanent residents *Noel* v. *Chapman*, 508 F.2d 1023 (2d Cir. 1975). Even if the government were to ignore Hibbert's prior fraudulent marriage, his second marriage to a lawful permanent resident would not have saved him from deportation or prevented a family disruption. Therefore his motion to reopen to apply for voluntary departure could serve no purpose other than to delay his departure until such time as he could obtain an immigration visa as an immediate relative at an American Consulate abroad after applying for permission to reenter pursuant to Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17). Clearly, Hibbert was not ready and willing to effect his voluntary departure at that time and he was therefore ineligible for the privilege under 8 C.F.R. § 244.1.

tory stay of deportation which acompanied his petition for review of the Board's order of deportation dated November 21, 1974.* On April 28, 1976 Hibbert filed a motion to reconsider its decision of May 30, 1975 (A.R. pp. 9-11). Hibbert now contended that new equities existed which had arisen subsequent to his motion to reopen on March 10, 1975. Specifically, Hibbert alleged that his second wife had been naturalized on July 22, 1975 and that he was now the father of a United States citizen infant born on September 5, 1975. These equities, he contended, rendered invalid the Service's prior objections that his second marriage was not sufficiently compelling to warrant voluntary departure and removed any doubt as to the bona fides of his second marriage. Furthermore, Hibbert alleged that the Service's oposition predicated upon 8 C.F.R. § 3.8 was moot because that litigation had been terminated. Finally, Hibbert alleged that his statutory ineligibility for voluntary departure under 8 U.S.C. § 1101(f) *would* be mooted on August 4, 1976 inasmuch as five years will have elapsed since he gave false testimony to support his first visa petition. The Service again opposed both Hibbert's request for a stay and his motion to reconsider. On June 3, 1976, while Hibbert was still ineligible for voluntary departure by reason of 8 U.S.C. § 1101(f), the Board denied Hibbert's motion for reconsideration. In its decision the Board concluded:

> "A visa petition submitted in behalf of the respondent by his wife has not yet been approved. A prima facie case warranting reopening for reconsideration of our prior decision, therefore, has not been made out at this point in the proceedings. Accordingly, we must deny the motion".

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* Only on April 21, 1976 after the Civil Appeals Management Program of this Court was extended to cover petitions for review of the Board's decision did Hibbert withdraw his petition.

On July 16, 1976, shortly after the alien had been ordered to report for deportation, Hibbert filed his second petition for review and again obtained another statutory stay of deportation. That petition, contrary to the contention Hibbert now presents in his brief, claimed that the Board's decision was "not based on evidence in the record" and represented an "abuse of discretion". (See Alien's Petition For Review ¶ 3).

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952), as amended.

Section 101, 8 U.S.C. § 1101—

(f) For the purposes of this Act—No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was—

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act;

The fact that any person is not within any of the forgoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character.

* * * * *

Section 244, 8 U.S.C. § 1254—

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 1251(a) of this title . . . to depart voluntarily from the United States at his own expense in lieu of deportation as such alien shall establish to the satisfaction of the

Attorney General that he is, or has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * * *

Relevant Regulations

Title 8, Code of Federal Regulations (C.F.R.) § 3.2

3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . .

3.8 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decisions as are pertinent . . .

ARGUMENT

The Board of Immigration Appeals did abuse its discretionary authority in declining to reconsider its prior decision in which the Board refused to reopen the petitioner's deportation proceedings.

Although the petitioner initially sought to overturn the Board's decision based on his contention that the Board abused its discretion the alien in his brief now submits new arguments in an attempt to reverse the Board's decision denying his motion for reconsideration.* Now Hibbert contends that the Board erred in *refusing or failing* to exercise its discretionary authority and erred in failing to determine whether Hibbert met the preliminary eligibility standards for the relief he sought (Petitioner's Brief, Statement of the Issue, p. 1; Petitioner's Brief, Argument, Points I, II, and II). The Government respectfully submits that (1) the Board clearly exercised its discretionary powers and rendered a valid administrative decision; (2) this discretionary determination did not constitute an abuse of discretion.

A. The granting of a motion to reconsider a Board's prior decision is a matter of discretion.

The Immigration and Nationality Act contains no specific provisions for the reopening of a deportation proceeding. The Attorney General, under his broad grant

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* Clearly this is the only Board decision that can be reviewed under 8 U.S.C. § 1105a at this time. Review of Board's initial decision of November 21, 1974 was withdrawn *with prejudice* on April 21, 1976. Further, both the Board's decision of November 21, 1974 and its decision on his motion to reopen dated May 30, 1975 are time barred from judicial review under Section 106(a)(1), 8 U.S.C. § 1105a(a)(1).

of authority to administer and enforce the Act,* has promulgated regulations which permit reopening or reconsideration of prior decisions as a matter of discretion provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material."

Obviously, the regulations contemplate that a motion to reopen or reconsider a prior decision shall contain an offer of evidence, that the evidence offered shall have been heretofore unobtainable, and that the evidence if accepted would be sufficient to warrant the granting of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Voluntary Departure in lieu of Deportation Pursuant to Section 244(e) of the Act, 8 U.S.C. § 1254(e).

The granting or denial of the privilege of voluntary departure is also within the broad discretion of the Attorney General or his delegates. *Stranizalis* v. *Im-*

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* Section 103(a) of the Act, 8 U.S.C. § 1103(a).

migration and Naturalization Service, 465 F.2d 1016 (3d Cir. 1972); *United States ex rel. Bartsch* v. *Watkins*, 175 F.2d 254 (2d Cir. 1949). Furthermore, even if the alien carries his burden by meeting the statutory and regulatory prerequisites for a grant of voluntary departure, see 8 U.S.C. § 1254(e); 8 C.F.R. § 244.1, this merely establishes his eligibility for relief. Discretion must still be exercised and may properly result in a denial of the privilege. *Strantzalis* v. *Immigration and Naturalization Service, supra; Khalaf* v. *Immigration and Naturalization Service*, 361 F.2d 208 (7th Cir. 1966); *Fernandez-Gonzalez* v. *Immigration and Naturalization Service*, 347 F.2d 737 (7th Cir. 1965). See also *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957). The privilege of voluntary departure is considered extraordinary discretionary relief, and will only be granted in meritorious cases. *Diric* v. *Immigration and Naturalization Service*, 400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969). The absence of good faith, the use of dilatory tactics and the failure to depart within the initial period set by the Immigration Judge may in and of itself be a sufficient ground for the denial of additional discretionary relief.* *Fan Wan Keung* v. *Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel. Lee Pao Fen* v. *Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin* v. *Esperdy*, 277 F. Supp. 482 (S.D.N.Y. 1964), *aff'd*, 334 F.2d 999 (2d Cir.), *cert. denied*, 379 U.S. 901 (1964).

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* Hibbert was initially granted the privilege of voluntary departure by the District Director of the Service Buffalo office. He failed to effect a timely departure within that grace period and inasmuch as he has no right to remain in the United States further discretionary relief is certainly unwarranted. See *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 928; *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983.

C. The Board did not abuse its discretion in declining to reconsider its prior decision on the alien's motion to reopen to apply for voluntary departure.

Hibbert's contention that the Board erred by failing to exercise its discretion and determine whether he had met the minimum preliminary requirements eligibility is without merit. Hibbert asserts that since he had overcome all prior objections voiced by the Board in opposition to his motion to reopen he must have been and was then statutorily eligible for the relief sought. Clearly this is erroneous. The alien's own motion for reconsideration concedes that with respect to his false statements the five year time bar under Section 244(e) of the Act had not elapsed as of the date of his motion or the date of the Board's decision on that motion.* Furthermore, the alien's argument that the Board erred by failing to determine whether he met the minimum eligibility requirements for relief under Section 244(e) of the Act is without merit in view of the Supreme Court's decision in *Immigration and Naturalization Service* v. *Bagamasdad*, 531 F.2d 111 (3d Cir. 1976); *judgment reversed* — U.S. — (45 U.S.L.W. 3322) (U.S. Docket No. 76-1666). Under *Bagamasdad* it is clear that the Board can pretermit a decision as to minimum statutory eligibility on an application, such as one under Section 244(e) of the Act, and act solely on the basis of administrative discretion.

As previously noted the Board denied Hibbert's motion for reconsideration as an exercise of discretion because,

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*It should be noted that in stipulating to withdraw his first petition for review with prejudice Hibbert chose not to challenge the Immigration Judge's finding that he was statutorily ineligible under Section 101(f) for the privilege of voluntary departure.

in the absence of an approved visa petition, reflecting a bona fide marital relationship, a prima facie case warranting reopening had not been demonstrated at that point in the administrative proceedings. Without question the Board exercised its discretionary powers in denying the motion. Therefore, the sole issue in this action, is whether the Board abused its discretion in reaching its decision. In reviewing an exercise of the Board's discretionary authority the scope of review is extremely narrow. Accordingly, it precludes this Court from substituting its judgment for that of the Board unless that determination is found to be without any rational explanation, to depart inexplicably from established practices, or rest on an impermissible basis, *Wong Wing Hong* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966).

We submit that the underlying facts of this case clearly support the Board's decision and demonstrate that it did not abuse its discretion in refusing to reopen the deportation proceedings in the absence of an approved visa petition.

Initially it should be noted that an alien has no right to be or remain in the United States during the processing of a visa petition or pending the issuance of an immigrant visa despite his claimed relationship to a United States citizen, spouse or child. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957); *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir. 1958), *cert. denied*, 357 U.S. 928; *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983. See also *Encisco-Cardozo* v. *Immigration and Naturalization Service*, 504 F.2d 1252, 1181 (2d Cir. 1974). Thus, in order for Hibbert to claim any benefits under the immigration laws he has the burden of establishing that his current marriage is bona fide and was not contracted solely to obtain an immigration benefit. See *Lutwak* v. *United States*, 344 U.S. 604

(1953); *Kokkinis* v. *District Director*, 429 F.2d 938 (2d Cir. 1970); *United States* v. *Diogo*, 320 F.2d 898 (2d Cir. 1963).

Given the circumstances surrounding his first "marriage, it is not unreasonable for the Service to require a careful examination of his second before passing on his eligibility for discretionary relief. In this regard, Hibbert's first "marriage", in addition to being suspicious, failed to establish any equities upon which discretionary relief such as voluntary departure could be granted. In fact it conveniently forestalled his deportation until he was in a position to seek discretionary relief on the basis of his second "marriage" which, again conveniently occurred right after he was ordered to be deported. In addition, the bona fides nature of this second "marriage" is crucial for without an approved visa petition establishing its validity, Hibbert has no close family ties which warrant the reopening of his deportation hearing. Thus, in its decision the Board quite properly indicated that, in this case, the approval of the visa petition was a condition precedent to its reopening Hibbert's hearing. In this context and examined against Congress' policy of preventing fraudulent marriages by requiring aliens to establish the validity of their marriage before obtaining immigration benefits, the Board's decision clearly represents a proper conclusion, based on its established policies as well as the law applicable to situations of this kind.* *Wong Wing Hong, supra.*

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* Hibbert's present visa petition submitted on the basis of his second marriage is currently being adjudicated by the District Director's office in Buffalo, New York. Undoubtedly in light of Hibbert's prior marriage and the eleventh hour timing of his second marriage this petition is being carefully investigated. The Board does not control the depth of the District Director's investigation in this matter. Nonetheless instead of multiple motions

[Footnote continued on following page]

Moreover the propriety of the Board's decision in this case is not altered by the recent Fourth Circuit decision in *Yee Dai Shek* v. *Immigration and Naturalization Service*, 541 F.2d 1067 (4th Cir. 1976), a case not cited by the petitioner. In *Shek*, *supra*, the Fourth Circuit granted a petition for review where the alien challenged the Board's denial of his motion for reconsideration based upon his marriage to a United States citizen and the birth of a citizen child. We respectfully submit that the facts in Hibbert's immigration history distinguish this action from that which was presented to the Fourth Circuit and submit that the underlying rationale behind the Fourth Circuit's decision should be rejected by this Court. See *Shek*, *supra* at 1070 Bryan, *J.* (dissenting). First, the marriage in *Shek* was the alien's first marriage. Absent a history like Hibbert's there was no reason for the Board or the Service District Director to suspect marriage fraud in the *Shek* case. In fact, as the Court noted Shek's visa petition was granted during the pend-

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to the Board and subsequent petitions for review, if Hibbert suggests that administrative action is being arbitrarily withheld on his visa petition and if Hibbert has genuinely met his burden of proof in that proceeding his proper remedy would be an action in the nature of mandamus coupled with an application for permission to reenter pursuant to Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a)(17). Furthermore, Hibbert's demand for a remand and reopening would accomplish nothing. In view of Hibbert's history, both the presiding Immigration Judge and the prosecuting Service trial attorney would require the same careful investigation into the bona fides of Hibbert's present marriage that the District Director is currently conducting. The petitioner's brief in this respect relies on facts that are not in the record of proceedings, were not presented to the Board, and cannot be reviewed de novo in a petition for review. Section 106(a)(4) of the Act, 8 U.S.C. § 1105a(a)(4).

* As a result of the enactment of P.L. 94-571, Immigration and Nationality Act Amendments of 1976, October 20, 1976, aliens from the Western Hemisphere will be eligible for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255.

ency of the petition for review. Even though Hibbert's second marriage and his wife's naturalization occurred subsequent to his deportation hearing and could therefore be considered "not available" under 8 C.F.R. § 3.2 we submit that, in the absence of an approved visa petition, these factors are neither "material" nor significant. Hibbert's purpose in this appeal is not merely to obtain voluntary departure and avoid the stigma of deportation. Instead he seeks that privilege so he can use it with an approved visa petition [as an immediate relative of a United States citizen] in order to immediately obtain an immigrant visa and return to the United States.* Without an approved visa petition his "new" evidence alleging close family ties is not significant and does not justify, as the Board expressly stated, reconsideration "at this point in the proceedings".

The discretionary action taken by the Board is not inconsistent with its prior decisions. *In Matter of T*, 5 I & N Dec. 736, 737 (B.I.A. 1954), relied upon by the petitioner and the Fourth Circuit in *Shek* the Board specifically noted that while reopening may be proper as a general rule this guideline pertained to only those cases where there existed no *unusual factors*. Clearly, as in Hibbert's case, where the only possible basis for the granting of discretionary relief is a second marriage and where the alien previous marital history is questionable vis-a-vis the immigration laws the general rule in *Matter of T*, *supra*, is no longer applicable.

Furthermore, based on more general policy considerations relating to the effective enforcement of the immigration laws and Congressional concern with regard to marriage fraud in the immigration area we respectfully contend that the *Shek* rationale should not be followed. As Judge Bryan correctly noted in his dissenting opinion in *Shek*, *supra* at p. 1076:

> "Appellant suggests that his marriage to a newly admitted citizen, a former national of his native country, and the birth of their child entitled him to an award of voluntary departure. In this he presses the hardship of the wife and child upon his separation from them should he be required to pursue an honest course for entry. If we are persuaded by such arguments, he has established for aliens an imitable pattern of circumvention by all such aliens of the Acts of Congress relating to admission for permanent residency."

Certainly to accept Hibbert's arguments despite the history of his first marriage would be expansive precedent for aliens who chose to circumvent the immigration laws and would be contrary to express Congressional concern over sham marriages under the Act. See 8 U.S.C. §§ 1154(c), 1251(c). The use of the statutory stay in Section 106 of the Act to obtain time for multiple admintrative appeals and to create alleged equities in order to subsequently apply for discretionary relief would be condoned. That was not the intent of Congress and has been continuously rejected by this Court. See *Acevedo* v. *Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976); *Fan Wan Keung* v. *Immigration and Naturalization Service*, 434 F.2d 301, 304-05 (2d Cir. 1970).

CONCLUSION

The petition for review should be denied.

December, 1976

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 714—017—004

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 21st day of December 1976 she served two copies of the within Respondent's Brief

by placing the same in a properly postpaid franked envelope addressed:

Pollack and Kramer
225 Broadway
New York, New York 10007

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

21st day of December, 1976

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978